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No. 93-1741

In The

Supreme Court of the United States

October Term, 1993

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

NEWPORT LIMITED, A PARTNERSHIP IN COMMENDAM,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Newport's Response acknowledges that reliance on hypothetical future evidence to defeat a motion for summary judgment is "inappropriate." [Newport response at page 6 f/n 1]. Yet, Newport disingenuously ignores the fact that the district court found Newport failed to present any admissible evidence in response to Sears' motion for summary judgment with respect to Newport's damages claims. Thus, the district court referred to the evidence offered by Newport in support of its damages claims and held.

> "[T]he court cannot ignore a duty imposed on it by law to require proof -- direct or circumstantial, -- but at least some proof -- of alleged damages. This Court will not leave such determination to a jury for speculation and conjecture."

(Appendix to Sears' Petition at pages 53a - 54a). Given that Newport offered "evidence" in the form of exhibits prepared by

its expert on the issue of damages allegedly sustained by Newport, the district court, by holding as it did, necessarily found the "evidence" offered by Newport inadmissible and that only hypothetical future evidence could support Newport's claim of damages.

Consequently, the Fifth Circuit's reversal of the summary judgment in favor of Sears on the issue of damages is premised either upon a complete misunderstanding of the district court's evidentiary findings or upon the erroneous conclusion that summary judgment can be denied based on the expectation of hypothetical future evidence. In either case, the Fifth Circuit's reversal was erroneous, and this Court should grant Certiorari to review it.

A situation strikingly similar to the one before the district court on Sears' motion for summary judgment on the issue of damages also was the subject of *Benavides v. County of Wilson*, 955 F.2d 968, 971 (5th Cir. 1992), a case cited and discussed in Sears' Petition, but wholly ignored by Newport in its Response. In *Benavides*, a plaintiff, responding to a motion for summary judgment, offered "expert" testimony. The district court did not expressly rule upon the "admissibility" of that expert's opinions, but granted defendant's motion for summary judgment because the expert opinion was "insufficient to raise a fact issue as to [the] existence of an unconstitutional policy or custom." *Benavides v. County of Wilson*, 955 F.2d 968, 971 (5th Cir. 1992). The Fifth Circuit held that such a finding by the district court was substantively tantamount to a finding that the expert evidence proffered in opposition to the summary judgment motion was *inadmissible*. *Benavides v. County of Wilson*, 955 F.2d 968, 971 (5th Cir. 1992). In the present case too then, the district court, in finding that Newport failed to offer any proof on the issue of damages, necessarily found the expert opinions offered by Newport on the subject to be inadmissible.

Newport's assertion that the district court's finding on summary judgment was based on the "sufficiency" of the evidence rather than the admissibility of the evidence ignores not only *Benavides*, but also the express language used by the district court. Specifically, the district court found that Newport failed to

offer *any* proof of its alleged damages, despite the fact that Newport did offer expert opinion evidence in response to Sears' motion for summary judgment. Consequently, the district court necessarily found that the expert evidence offered by Newport in response to Sears' motion for summary judgment was inadmissible.

The Fifth Circuit, in violation of *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, _____ U.S. _____, 113 S.Ct. 2786 (1993), as well as *Benavides*, and in a flagrant abuse of its discretion, literally closed its eyes to the district court's express finding that Newport failed to present any "proof," direct or circumstantial, of its damages. Contrary to the Fifth Circuit's characterization, the issue was not the sufficiency of the evidence offered by Newport in response to Sears' motion for summary judgment because the district court found a *complete failure* of evidence on damages. In order to reach that conclusion, the district court necessarily in substance excluded the evidence proffered by Newport on damages. Clearly, then, the Fifth Circuit's putative "correction," which Newport concedes was made in response to Sears' Petition For Rehearing and Suggestion for Rehearing *En Banc*, simply, and apparently deliberately, ignored the district court's findings on the admissibility of the expert opinion evidence offered by Newport.

It is clear that the Fifth Circuit ignored the issue of the admissiblility of the expert opinion testimony offered by Newport, an issue which the district court itself recognized, as *Daubert* held, it was duty-bound to consider. In order to reach that conclusion, the Fifth Circuit necessarily disregarded the district court's finding that Newport failed to offer any proof of its damages. Newport's assertion that the Fifth Circuit's "pronouncement" regarding the admissibility of Newport's damages evidence rings hollow when viewed in proper context. As Sears pointed out in its Petition, the district court correctly performed its gatekeeper function, as required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, _____ U.S._____, 113 S.Ct. 2786 (1993). The Fifth Circuit should not be permitted to simply wave its hand at this controlling law by misstating the substance of the district court's ruling.

CONCLUSION

For each and all of the reasons set forth above, as well as the reasons set forth in Sears' Petition, Petitioner respectfully requests this Court to issue a Writ of Certiorari and thereafter rule that the judgment of the United States Court of appeals for the Fifth Circuit be reversed.

Respectfully Submitted,

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